In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1612

URBAN B. LUETKEMEYER and KENNAN L. LUETKEMEYER and JACQUELINE LUETKEMEYER, by Next Friend URBAN B. LUETKEMEYER,
Appellants,

vs.

HAROLD KAUFMANN, MARGARET HIGGINS, JAMES STARK, ROBERT BEMBOOM, CLETUS HIRSCHVOGEL, and JOHN LUECKENOTTE, Being Members of the Board of Directors of R-III Cole County School District; F. BURTON SAWYER, E. J. MELTON, JACK WEBSTER, SIDNEY R. REDMOND, DALE M. THOMPSON, W. C. BANTA, HARVEY B. YOUNG, JR., MRS. ELEANOR B. GRIFFITH, Being Members of the State Board of Education of the State of Missouri, and ARTHUR L. MALLORY, Commissioner of Education of the State of Missouri,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION

MOTION TO AFFIRM

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Appellees move to affirm the judgment of the United States District Court for the Western District of Missouri

because the questions presented are so unsubstantial as not to need further argument and because the decision below is so obviously correct as to warrant no further review.

OPINION BELOW

The opinion of the United States District Court for the Western District of Missouri (Appendix I to Jurisdictional Statement) is reported at 364 F.Supp. 376 (W.D. Mo. 1973).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED

Appellants list nine questions which they suggest are presented by this appeal. Appellees believe only one question is presented by this appeal.

> Does the Constitution of the United States require the State of Missouri to provide bus transportation to children attending church-related schools if Missouri provides bus transportation to some children attending public schools?

STATUTES INVOLVED

In addition to the Missouri statutes governing pupil transportation which are set forth in Appendix V to the Jurisdictional Statement, Section 162.621, RSMo 1969, per-

taining only to school districts in cities not within a county, i.e. School District of the City of St. Louis, provides as follows:

> "The board of education shall have general and supervising control, government and management of the public schools and public school property of the district in the city and shall exercise generally all powers in the administration of the public school system therein. The board of education has all the powers of other school districts under the laws of this state except as herein provided and shall perform all duties required by general laws of school districts so far as they are applicable to the public school affairs of the city and are consistent with this law. It shall appoint the officers, agents and employees it deems necessary and proper and fix their compensation. The board of education may:
>
> * * *
>
> (8) Provide for the gratuitous transportation of pupils to and from schools in cases where by reason of special circumstances pupils are required to attend schools at unusual distances from their residences.

STATEMENT OF THE CASE

Appellants, in their Statement of the Case, emphasize the evidence which they contend suggests that pupil transportation is a public welfare measure. In so doing, appellants completely ignore the evidence introduced by the defendants that pupil transportation in Missouri is an educational service constituting a direct benefit to the institution to which the pupils are transported. The testimony of witnesses Summers and Haynes and numerous excerpts

from Annual Reports of the Public Schools of the State of Missouri, published by the Missouri State Department of Education for the years 1902 through 1970, support the conclusion that the primary impetus behind the development of pupil transportation in Missouri was the desire to improve the educational opportunities available to rural school children. The legislative and administrative emphasis on school bus safety was a *result* of the rapid growth of pupil transportation and not the purpose for its development. See Stipulation of Facts No. 2, paragraphs 46, 50-51 and 52-53, and Exhibits S through OOO.

Appellants also ignore the Missouri Supreme Court decision in *McVey* v. *Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (Banc 1953). In this decision, the Missouri Supreme Court ruled unconstitutional a statute which authorized the use of public funds to transport children to private schools. Under the Missouri Constitution of 1945 (Article IX, Sections 3 and 5) public funds for education can be lawfully expended only for "establishing and maintaining free public schools. . . ." The Court concluded that the expenditure of public funds for pupil transportation to public schools is an expenditure for "establishing and maintaining free public schools. . . ." However, an expenditure for transportation to private schools would not be an expenditure for "establishing and maintaining free public schools. . . ." If the expenditure of money to transport students to public schools assists in the establishment and maintenance of public schools, by strong inference from *McVey* such an expenditure for transportation to church-related schools would assist in "establishing and maintaining" sectarian schools. Therefore, pupil transportation in Missouri cannot be claimed to be a public welfare meaure solely benefiting children as claimed by appellants.

ARGUMENT

The decision of the District Court is plainly correct. The questions raised by appellants in the Jurisdictional Statement concerning the validity of Missouri's refusal to provide pupil transportation to and from church-related schools are so insubstantial as not to warrant further argument.

"Missouri has a long history of maintaining a very high wall between church and state." *Luetkemeyer* v. *Kaufmann*, 364 F.Supp. 376, 383 (W.D. Mo. 1973). Absolute separation of church and state is expressed by several sections of the 1945 Missouri Constitution. See, for instance, Article I, Section 7, which states in part that ". . . no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination or religion, or in aid of any priest, preacher, minister or teacher thereof, as such; . . ." and Article IX, Section 8, which states in part that "Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything . . . to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; . . ."

The Missouri Supreme Court has recognized and enforced this constitutional policy on several occasions. *Harfst* v. *Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (Banc 1942); *Berghorn* v. *Reorganized School District No. 8*, 364 Mo. 121, 260 S.W.2d 573 (1953); and *McVey* v. *Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (Banc 1953). In *Harfst*, as noted by the District Court, the Missouri Supreme Court described the Missouri Constitution as going "farther than those of some other

states" in prohibiting public assistance to religion. 163 S.W.2d at 613.

In *McVey* v. *Hawkins, supra*, the Missouri Supreme Court ruled unconstitutional a statute which authorized transportation at public expense of children attending church-related schools. The statute was held violative of Sections 3 and 5 of Article IX, Missouri Constitution of 1945, which require that public school moneys of the State of Missouri can be used only in "establishing and maintaining free public schools and for no other use or purpose whatsoever." Article IX, Section 5.

The statutory provision which was declared unconstitutional by the Court in *McVey* was deleted in 1963 and, therefore, the current statutes authorizing transportation at public expense—Sections 167.231, 163.161 and 162.621, RSMo—must be interpreted as authorizing only transportation of students attending public schools. Therefore, the wall between church and state in Missouri prohibits pupil transportation to church-related schools at public expense for the reason that such transportation constitutes support of schools other than free public schools.

Appellants argue that nine substantial questions are raised by Missouri's refusal to transport children to sectarian schools. Underlying these questions are two major arguments: (1) that an alleged unlawful classification results from Missouri's refusal to transport children to church-related schools (sometimes claimed to be a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and sometimes claimed to be a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States) and (2) that the Free Exercise Clause of the First Amendment to the Constitution of the United States has been infringed.

Appellants argue that Missouri may not rationally conclude that neutrality as to sectarian schools can best be achieved by withholding all state assistance including transportation of pupils to and from such religious schools. Appellants' position in this regard raises no substantial question worthy of plenary consideration by this Court.

As this Court stated in *Norwood* v. *Harrison*, 413 U.S. 455 (1973):

> ". . . It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a state may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.
>
> ". . . Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private, non-sectarian schools in some circumstances —health care and textbooks, for example—a state could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance. . . ." *Id.* at 462.

See, also, *Brusca* v. *State of Missouri ex rel. State Board of Education*, 332 F.Supp. 275, 279 (E.D. Mo. 1971), aff'd 405 U.S. 1050 (1972).

Appellants' free exercise argument is equally insubstantial. They argue that because pupil transportation for children attending church-related schools is permitted under the Establishment Clause, it is a violation of the Free Exercise Clause not to so provide it. Previous decisions of this Court have established that there is an area between

the Establishment Clause of the First Amendment and the Free Exercise Clause of the First Amendment where action by government will not violate the former nor inaction violate the latter. See *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

In *Norwood* v. *Harrison*, *supra*, this Court noted that the Free Exercise Clause does not mandate what may be permitted under the Establishment Clause.

> "Our decisions under the Establishment Clause reflect the 'internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause,' Tilton v. Richardson, 403 U.S. 672, 677, 29 L.Ed. 2d 790, 91 S.Ct. 2091. *This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even 'neutral' services to sectarian schools. . . .*" *Id.* at 469. (Emphasis supplied.)

Even though Missouri could, without violating the Establishment Clause, furnish transportation to pupils attending church-related schools, this State is not "constitutionally obligated" by the Free Exercise Clause to provide such transportation. See, also, *DiCenso* v. *Robinson*, 316 F.Supp. 112 (D. R.I. 1970), aff'd 403 U.S. 602 (1972) in which the District Court stated:

> ". . . intervenors argue that the free exercise benefits which flow from aid to parochial education should prevail over the establishment clause values protected by strict separation, citing in support of their argument Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963).
>
> "While sympathetic to intervenors' dilemma, we note that it stems primarily from their personal evaluation of public school education. We reject the notion

that the Free Exercise Clause demands affirmative state action to accommodate such personal evaluations when society at large has accepted the premise that religious and secular education can be successfully separated. See Freund, Public Aid to Parochial Schools, 82 Harv.L.Rev. 1680, 1686-1687 (1969)." *Id.* at 123.

Therefore, appellees respectfully submit that appellants present no substantial question for the decision of this Court and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIORARI DENIED